86-76

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1986

BRANCH BANKING AND TRUST COMPANY, ET AL.,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether commercial banks in competition with a federal credit union have standing, under the "zone of interests" test, to challenge the administrative chartering of the credit union as being in violation of the chartering standards of the Federal Credit Union Act.

PARTIES TO THE PROCEEDINGS

The six petitioners before this Court were the appellants in the Court of Appeals and the plaintiffs in the District Court. They are: (1) Branch Banking and Trust Company;* (2) First Union National Bank; (3) NCNB National Bank of North Carolina; (4) The Planters National Bank & Trust Company; (5) United Carolina Bank; and (6) Wachovia Bank and Trust Co., N.A.

The four respondents before this Court were the appellees in the Court of Appeals and the defendants in the District Court. They are: (1) National Credit Union Administration Board; (2) E. F. Callahan, Chairman of the National Credit Union Administration Board; (3) National Credit Union Administration; and (4) North Carolina Local Government Employees Federal Credit Union.

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*The correct corporate name of the first petitioner is Branch Banking and Trust Company, not Branch Bank and Trust Company as cited in the opinion of the court below.

RULE 28.1 LISTING

In accordance with Rule 28.1, the petitioners list the bank holding companies of which they are subsidiaries:

Petitioner	*Holding Company*
1. Branch Banking & Trust Co.	1. Branch Corporation
2. First Union National Bank	2. First Union Corporation
3. NCNB National Bank of North Carolina	3. NCNB Corporation
4. The Planters National Bank & Trust Company	4. The Planters Corporation
5. United Carolina Bank	5. United Carolina Bankshares Corporation
6. Wachovia Bank and Trust Co., N.A.	6. The Wachovia Corporation

None of the petitioners has any subsidiaries or affiliates to be listed under Rule 28.1.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

The six petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The six petitioners are: (1) Branch Banking and Trust Company; (2) First Union National Bank; (3) NCNB National Bank of North Carolina; (4) The Planters National Bank &

Trust Company; (5) United Carolina Bank; and (6) Wachovia Bank and Trust Co., N.A.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, dated March 18, 1986, is reported at 786 F.2d 621, and is reprinted in Appendix A hereto, *infra*, p. 1A.

The "Memorandum and Order Allowing Summary Judgment," entered by the District Court for the Eastern District of North Carolina on April 24, 1985, has not been officially reported. That order is set out in Appendix C hereto, *infra*, p. 16A.

JURISDICTION

The judgment of the Court of Appeals, which was entered on March 18, 1986, is reprinted in Appendix B hereto, *infra*, p. 12A. The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing in banc, filed on April 21, 1986, is also set forth in Appendix B hereto, *infra*, p. 14A. This petition for certiorari is filed within 90 days of the rehearing denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Credit Union Act of 1934, as amended, 48 Stat. 1216, 1219, 12 U.S.C. § 1759:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at

least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district . . .

Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . .

STATEMENT

There is but one question in this case. Is the competitive interest of commercial banks in being free from unlawful competition in providing bank services throughout North Carolina "arguably within the zone of interests"[1] protected by the Federal Credit Union Act, 12 U.S.C. § 1759? To put the question differently, does that "zone of interests" arguably protect commercial banks from the competition afforded by a federal credit union chartered to do business in North Carolina in violation of the limitations set by § 1759?

The relevant facts are not in dispute. The petitioners before this Court are six commercial banks operating

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[1] *Association of Data Processing Organizaitons v. Camp*, 397 U.S. 150, 153 (1970).

throughout North Carolina. In May of 1984 they brought this declaratory and injunctive action under the Administrative Procedure Act, 5 U.S.C. § 704. The complaint challenged the grant by the respondent National Credit Union Administration ("NCUA") of an organizational certificate to a new federal credit union to be operated throughout North Carolina. That credit union, now in full operation, is known as the North Carolina Local Government Employees Federal Credit Union ("LGCU"). It is chartered to provide banking services to employees and officials of 245 separate city and county government units scattered throughout the state.

The advent of this new credit union brought it into direct competition with commercial banks in North Carolina. As the Fourth Circuit observed, LGCU competes with these banks "for depositors, borrowers, and other consumers of financial services." App. A, *infra*, p. 5A. Immediately after it began operations on July 1, 1983, LGCU enlisted more than 6,000 county and municipal employees from the 245 separate units. J. App. 11-12. LGCU made its initial loan in September of 1983; three weeks later it had loaned $1.5 million to 752 members. By October of that year, local government employees were joining LGCU at an average rate of 60 per day. *Id.* Moreover, LGCU not only secured processing and transaction services from the much larger North Carolina State Employees Credit Union but shared office space at many of that organization's branch offices throughout the state. J. App. 290. Such competitive activities by LGCU caused substantial injury to the business interests of the six commercial banks operating in the same geographic area. That obvious fact led the Fourth Circuit to agree that the banks "have satisfied the constitutional requirements of standing," particularly the requirement that they "suffered some actual or threatened injury." App. A, *infra*, p. 5A.

The Fourth Circuit also agreed that the second prong of the Article III standing test was satisfied in this case, *i.e.*,

the injury suffered by the banks was "a result of the putatively illegal conduct" of the federal respondents in awarding a charter to LGCU. App. A, *infra*, p. 5A. The alleged illegality focused on the failure of the credit union agency to respect the limitation imposed by § 1759 of the Federal Credit Union Act on the grant of federal charters. That section provides that federal credit union membership "shall be limited to groups having a common bond of occupation or association." Thereby excluded are those groups lacking such a "common bond." And since LGCU allegedly lacks that "common bond," the injury that LGCU inflicted on the commercial banks can be fairly traced to the award of its federal charter. But for the award, the injury would not have taken place.

The banks' challenge to the LGCU chartering noted that the groups encompassed by the charter application were self-defined as "Employees and elected and appointed officials of city and county governmental units in North Carolina," subject to various exclusions.[2] These units, 245 in number, are scattered throughout the state, and the employees and officials eligible for membership arguably have no "common bond of occupation or association" as required by § 1759. Nor do they appear to fit within the definition of a "common bond" contained in the organizing

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[2] According to the original organization certificate, the proposed field of membership of LGCU was composed of the following (J. App. 264-266):

> Employees and elected and appointed officials of city and county governmental units in North Carolina, except those eligible (by virtue of their employment) for membership in another credit union maintaining an office in North Carolina; employees of the North Carolina League of Municipalities or the North Carolina Association of County Commissioners in Raleigh, North Carolina; spouses of persons who died while within the field of membership of this credit union; employees of this credit union; persons retired as pensioners or annuitants from the above employment; members of their immediate families; and organizations of such persons; and North Carolina League of Municipalities and North Carolina Association of County Commissioners.

manual for federal credit unions: "Common bond constitutes employment by the same employer, or employment in certain related activities in the same general locality, or employment within a very limited specified area."[3]

The argument that the LGCU units have no "common bond" finds strong support in the decision of the North Carolina Supreme Court in *Savings and Loan League v. North Carolina Credit Union Commission*, 302 N.C. 458, 276 S.E.2d 404 (1981). In that case, virtually the same LGCU units sought membership in the State Employees' Credit Union by applying for an expansion of that credit union's authorized field of membership. The attempt failed. The state court held that such a disparate group of local government employees did not have "a common bond of similar occupation, association or interest" as required by the North Carolina credit union statute.[4] After thoroughly canvassing the statutory concepts of "common bond of similar occupation, association or interest," the court concluded "that the class of persons set forth in the amended bylaw possess no common bond of any type." 302 N.C. at 473; 276 S.E.2d at 414. Since the North Carolina statutory language is virtually identical with the Federal Credit Union Act reference to "common bond of occupation or association," the *Savings and Loan League* precedent is very much in point, and adds to the substantiality of the banks' challenge to the chartering of LGCU.

On cross-motions for summary judgment, the District Court granted judgment for the respondents and

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[3] The manual, "Chartering and Organizing Manual for Credit Unions" (1980), is incorporated by reference in the NCUA rules and regulations. 12 C.F.R. § 701.2(a). The manual appears in the record at J. App. 23-a.

[4] Section 54-109.26(a) of the General Statutes of North Carolina states in pertinent part that "The membership of a credit union shall be limited to and consist of . . . persons within the common bond." Subsection (b) identifies the ways in which a common bond may be established, including groups "having a common bond of similar occupation, association or interest."

dismissed the banks' challenge. App. C, *infra*, p. 16A. The court held that the banks are not within the zone of interests to be protected by the "common bond" provision of the federal statute; therefore the banks have no standing to challenge the grant of a federal charter to LGCU.[5] The District Court's decision was primarily premised on the Fourth Circuit's "zone of interests" analysis in *Leaf Tobacco Exporters Association v. Block*, 749 F.2d 1106 (4th Cir. 1984).

The Fourth Circuit affirmed. In so doing, the court relied upon its own *Leaf Tobacco* interpretation of the zone of interests standing test, which was first articulated by this Court in *Association of Data Processing Organizations v. Camp*, 397 U.S. 150, 153 (1970). The Fourth Circuit applied the zone test to the facts of this case in the following manner:

1. Viewing the zone test as "not discretionary" in its application, the Fourth Circuit states that the test "serves primarily to advance the separation of powers values that constitute a central concern of standing principles in general." App. A, *infra*, p. 6A.

2. The court notes that where, as here, congressional legislation "alters the structure of the marketplace," to test standing only by the Article III injury-in-fact requirement "would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect." *Id.*

3. Thus, the court says, the zone test "'rests on the need to secure the benefits of a statutory program for the groups that Congress intended to benefit . . . [and] permits government officials to act in furtherance of congressional

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[5] The District Court also rejected the banks' Fifth Amendment due process and equal protection claims. App. C, *infra*, p. 19A. The equal protection claim was renewed on appeal, but was found "meritless" by the Fourth Circuit. App. A., *infra*, p. 5A, note. Neither Fifth Amendment claim is raised in this petition for certiorari.

purposes without the prospect of protracted court challenges from those whose interests Congress clearly did not protect.'" *Id.*

4. Moreover, states the Fourth Circuit, it is for Congress — not the courts — to determine what interests shall be protected or advanced or benefited and what interests shall be sacrificed to advance the protected interests. In other words, there are "winners" and "losers" whenever Congress drafts legislation affecting the marketplace. And the zone test "dictates" that the "losers," i.e., those left unprotected or unregulated by the legislation in question, "must return to the legislative process if they are dissatisfied with its outcome." App. A, *infra*, p. 7A. The zone test deprives the "losers" of any standing to challenge any misapplication of the statute respecting the "winners," "regardless of whether the statutory language at issue is restrictive or permissive." *Id.*, p. 8A.

5. In this case, the Fourth Circuit had "no trouble" concluding that the commercial banks, despite the injury occasioned by the competition of LGCU, "have failed to meet the requirements of the zone test." App. A, *infra*, p. 8A. The banks are "not compelled to avoid or to undertake any activity" under the Federal Credit Union Act or its common bond provision; and they "do not claim to be regulated by the statute." *Id.* To use the court's terminology, the banks are "losers" without standing to challenge any maladministration of the Act that causes injury-in-fact in the Article III sense.

6. Turning to the *Data Processing* zone test of whether the banks' interests are "arguably" within the "zone of interests to be protected" by the Federal Credit Union Act, the Fourth Circuit searched the intent of the statute and concluded that the common bond provision of § 1759 is not designed to protect the competitive interests of commercial banks. The sole purpose of § 1759 is to advance "the formation of credit unions that may realistically operate with unity of purpose" and to ensure "the cohesive operation of unions." App. A, *infra*, pp. 9A-10A.

7. Finally, the court commented that if the federal credit union agency "were seen to violate the common bond requirement to the detriment of [credit] union members, they would possess standing to sue," but the banks, "by virtue of the statute, simply do not occupy a similar position." App. A, *infra*, p. 10A. In sum, the banks were left to pursue their complaint by exerting their "significant power and influence in the executive and legislative process." *Id.*

REASONS FOR GRANTING THE WRIT

1. *The decision below raises the same "zone of interests" standing question that is pending before this Court for decision in Nos. 85-971 and 85-972.*

On March 3, 1986, this Court granted certiorari in two consolidated cases that raise essentially the same "zone of interests" standing problem that is presented by this petition. Those cases are: No. 85-971, *Clarke v. Securities Industry Association;* No. 85-972, *Security Pacific National Bank v. Securities Industry Association.* Both cases arise out of the same judgment of the Court of Appeals for the District of Columbia Circuit, 758 F.2d 739 (D.C. Cir. 1985).

The petition of the Solicitor General in No. 85-971 presents as its second question: "Whether an association of securities brokers, underwriters, and investment bankers has standing to challenge the application of the McFadden Act's branching limitations to national banks." The second question presented in the petition in No. 85-972 is: "Does an association with no cognizable connection with national or state banks fall within the group of persons the McFadden Act was intended to protect and therefore meet the 'zone-of-interests' standing prerequisite for seeking enforcement of the Act.?"

Both those petitions cite the Fourth Circuit's decision in *Leaf Tobacco,* 749 F.2d 1106, as reaching a result contrary to the "zone of interests" standing determination of the District of Columbia Circuit. See Pet. 20, in No. 85-971;

Pet. 22-23, in No. 85-972. The petitions were filed prior to the Fourth Circuit's decision in the instant *Branch Banking* case, a decision that relies heavily on *Leaf Tobacco*. The *Branch Banking* decision, however, does play a prominent supporting role in the briefs on the merits for the petitioners in No. 85-971 (see pp. 15, 18, 24) and in No. 85-972 (see pp. 35, 37).

The Court's decision in Nos. 85-971 and 85-972 may well control the appropriateness of granting certiorari in the instant case. Unless the Court wishes to set the instant case down for argument in tandem with the other two, this petition should be held pending decision and clarification of the "zone of interests" question in the consolidated cases.

Because the standing problem in the instant case is so similar and so enmeshed in the other two cases, the petitioners in this case have filed, with the consent of the parties, an *amici curiae* brief in support of the respondent in Nos. 85-971 and 85-972.

2. *The decision below conflicts with this Court's precedents as to the application to competitors of the "zone of interests" standing test.*

The Fourth Circuit has denied standing to commercial banks to protest the illegal chartering of a competing federal credit union, despite the financial injury to the banks concededly caused by such competition That holding misinterprets and misapplies the "zone of interests" standing test as developed by this Court. The decision thus directly collides with this Court's decisions in *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); and *Investment Co. Institute v. Camp*, 400 U.S. 617 (1971). All three decisions confered standing on competitors of banks to protest some maladministration of the applicable statutes that regulated the banks but not their competitors.

In addition, the Fourth Circuit's decision conflicts with

the District of Columbia Circuit's *per curiam* holding in *Securities Industry Association v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985), *affirming* 577 F.Supp. 252 (D.D.C. 1983). Certiorari has been granted to review that *per curiam* holding. See Nos. 85-971 and 85-972.

The conflicts generated by the Fourth Circuit's ruling manifest themselves in the following ways:

A. *Conflict as to Promoting Competitor Standing*

The Court's seminal decision in *Data Processing* created the "zone of interests" test primarily to promote competitor standing, to enlarge "the class of people who may protest administrative action." 397 U.S. at 154; and see *Arnold Tours*, 400 U.S. at 46. The test was designed to broaden the prior doctrine that a competitor had standing only if "the right invaded is a legal right" or interest. Cf. *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137 (1939).

But the Fourth Circuit has altered the zone test from one of inclusion to one of exclusion. By insisting that the competitors be within the direct zone of interests protected by statute, the court has effectively reverted to the narrower "legal right" test, whereby a competitor acquires standing only if some "legal right" has been invaded, such as "one founded on a statute which confers a privilege." *Tennessee Power*, 306 U.S. at 137-8. To say, as the Fourth Circuit says, that the Federal Credit Union Act is not intended to protect competing commercial banks is to say that the statute confers no legal rights or statutory privileges on the competing banks. Such a formulation of competitor standing turns the *Data Processing* formulation upside down. Rather than promoting the standing of competitors of those within the zone of statutory protection or regulation, the Fourth Circuit insists that the competitors themselves be within that zone, that the competitors have some statutory or legal right at stake.

B. *Conflict as to Purpose of Zone Test*

Data Processing describes the zone test as a prudential means of opening federal courts to those who have suffered competitive injury by reason of improper or erroneous administration of a federal statute. As the opinion indicates in the sentence immediately following the articulation of the zone test, 397 U.S. at 153, the test supplements the Administrative Procedure Act grant of standing, for judicial review purposes, to any person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

But in using the zone test, the Fourth Circuit has a quite different purpose in mind. It conceives a world in which there are "winners" and "losers" whenever Congress drafts legislation affecting the marketplace. "Winners" are those whose interests are directly in the zone of statutory protection or regulation; "losers" are those whose interests, competitive or otherwise, are rejected or ignored by Congress. The Fourth Circuit would thus restructure the zone test so that the judiciary would utilize the test to accomplish two goals: (1) to secure the benefits of a statutory program to the "winners," to those whose interests Congress intends to protect or regulate; (2) to close the doors of the federal courts to the "losers," to those who may be aggrieved in the competitive sense but whose interests are outside the zone of congressional concern.

From that restructuring, the Fourth Circuit proclaims that the "zone of interests" test partakes of the separation of powers doctrine and that federal courts are therefore constitutionally prohibited from entertaining challenges by aggrieved "losers" in the legislative arena. And while admitting that the zone test is still "prudential" in nature, the court puts a "mandatory" stamp on it. The result would seem to place the zone test on a par with the Article III minimal standing requirements of injury, causation and judicial redress. If so, this case demands review by this Court.

C. *Conflict as to Reliance on Legislative History*

To determine if the commercial bank competitors satisfy the "zone of interests" test, the Fourth Circuit feels compelled to examine "both the general purposes of the statute [the Federal Credit Union Act] and the specific interests served by the common bond requirement." App. A, *infra*, p. 8A. And having made that inquiry, the court concludes that the banks have failed the test, "that the interests of banks are far removed from the interests of the credit union members protected by these provisions." *Id.*

Such a search of legislative history seems quite misplaced, as well as contrary to this Court's teachings. As noted in *Arnold Tours*, 400 U.S. at 46, "In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition." In enacting statutes of this nature, Congress does not normally address the interests or the possible grievances of those not directly in the zone of protection or regulation. Hence the search of legislative history is more properly directed toward discovering if Congress has precluded judicial review at the instance of aggrieved parties. As *Data Processing* puts it, 397 U.S. at 157, the inquiry is limited to discovering if Congress, in enacting the relevant statutes, "sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes." The inquiry, in other words, is whether the competitors of those within the class of protected or regulated interests are themselves "within that class of 'aggrieved' persons who, under § 702 [of the Administrative Procedure Act], are entitled to judicial review of 'agency action.' " 397 U.S. at 157. See also *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970).

Had the Fourth Circuit followed the path set by *Data Processing*, it would find that nothing in the Federal Credit Union Act precludes "judicial review of admini-

strative rulings . . . as to the legitimate scope of activities available to [federal credit unions under the Act]." 397 U.S. at 157. And the court could also find that "Congress had arguably legislated against the competition that the petitioners [the commercial banks] sought to challenge, and from which flowed their injury." *Investment Co. Institute*, 401 U.S. at 620. No explicit statutory provision to that effect is necessary for zone test purposes. *Data Processing*, 397 U.S. at 155. It is enough that the statute uses words of limitation in describing the kinds of credit unions that can be chartered and can therefore enter into competition with other banking entities.[6]

In other words, if Congress by using words of limitation arguably did legislate against competition by federal credit unions lacking a "common bond of occupation or association," the zone test is satisfied. Then it can be said that the competitive interests of the commercial banks are "arguably" within the zone of interests to be protected or regulated by the Act.

D. *Conflict as to Application of Zone Test*

In its application of the zone test to the facts of this case, the Fourth Circuit has reached a result in conflict with the results reached by use of the zone test in the three precedents of this Court:

1. In *Data Processing*, companies that offered data processing services to the general business community had standing, under the zone test, to challenge an administrative ruling that national banks could make data processing services available to other banks and to

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[6] The Federal Credit Union Act, 12 U.S.C. § 1759, provides expressly that "Federal credit union membership *shall be limited* to groups having a common bond of occupation or association." Emphasis added. Arguably, Congress is saying that credit unions lacking that common bond shall not be chartered or authorized to compete in the banking service marketplace. To that extent Congress has legislated so as to protect commercial banks from competition from credit unions having no common bond.

bank customers — in competition with the data processing companies.

2. In *Arnold Tours,* travel agents serving the general public had standing, under the zone test, to challenge an administrative ruling that national banks may provide travel services for their customers —in competition with the travel agents.

3. In *Investment Co. Institute,* open-end investment companies had standing, under the zone test, to challenge an administrative ruling authorizing national banks to establish and operate collective investment funds — in competition with investment companies.

4. And so in the instant case, commercial banks offering banking services to the general public should have standing, under the zone test, to challenge an administrative act chartering a federal credit union that offers banking services to its members — in competition with the commercial banks.

In none of these instances did the relevant statute expressly protect the competitive interests of the challengers. In each case it was the competitive injuries suffered by the challengers, injuries that Congress did not intend to inflict, that created compliance with the zone test for standing.

3. *The decision below reflects the confusion and divergent approaches among lower federal courts as to the meaning and application of the zone test.*

In light of the grant of certiorari in Nos. 85-971 and 85-972, wherein the meaning and application of the zone test are squarely put in issue, little need be added here as to the growing confusion and conflict among lower federal courts respecting the test. Both petitions for certiorari in those cases stressed the confusion and conflict. Pet. 23-24, in No. 85-971; Pet. 20-22, in No. 85-972.

It is relevant to note that the Fourth Circuit itself has recognized the conceptual difficulties attendant upon the application of the "zone of interests" standing test. In

Leaf Tobacco Exporters Association v. Block, 749 F.2d 1106, 1110 (4th Cir. 1984), written by the same judge who authored the opinion below, the Fourth Circuit stated:

> The question of a plaintiff's standing to sue is one that we approach with caution. The doctrine of standing is axiomatic in its complexity; judges and scholars have agreed that the concept is 'among the most amorphous in the entire domain of public law.' *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting Professor Paul A. Freund). This is especially true of the 'zone of interest' principle first articulated by the Supreme Court in [*Data Processing*]. From its inception, the 'zone test' has suffered academic criticism. Lower federal courts have drawn imperfect guidelines from the *Data Processing* doctrine: some courts have ignored the test, others have opposed it, and several have construed it in different ways. *See Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 881 (1981) (citing cases).
>
> The Supreme Court, finding little occasion for further application of the test, has not yet responded to this criticism.

In sum, as Circuit Judge Ginsburg said in her concurring opinion in *Copper & Brass Fabricators Council v. Dept. of the Treasury*, 679 F.2d 951, 955 (D.C. Cir. 1982), "[c]larification from the [Supreme] Court would facilitate the expeditious, even handed disposition of standing controversies by lower courts."

CONCLUSION

For the foregoing reasons, this petiton for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 85-1522

Branch Bank and Trust Company;
First Union National Bank;
NCNB National Bank of North Carolina;
The Planters National Bank & Trust Co.;
United Carolina Bank and
Wachovia Bank & Trust Co., N.A.,

Appellants,

versus

National Credit Union Administration Board;
E.F. Callahan, Chairman of the National
Credit Union Administration Board;
National Credit Union Administration and the
North Carolina Local Government Employees
Federal Credit Union,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (C/A 84-513).

Argued: December 3, 1985 Decided: March 18, 1986

Before WIDENER and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

John R. Jordan, Jr. and Henry W. Jones, Jr. (Robert R. Price; William B. Aycock; Edmund D. Aycock; Jordan, Brown, Price & Wall on brief) for Appellants; Mark A. Pogue, Appellate Staff, Civil Division, Department of Justice (Richard K. Willard, Acting Assistant Attorney General; Samuel T. Currin, United States Attorney; Anthony J. Steinmeyer on brief) for Federal Appellees; John V. Hunter (Hunter, Wharton & Howell) for Appellee the North Carolina Local Government Employees Federal Credit Union.

WILKINSON, Circuit Judge:

This dispute requires us to consider once again the standing of those seeking to protect their market position from adverse administrative action, an issue we addressed in *Leaf Tobacco Exporters Association, Inc. v. Block*, 749 F.2d 1106 (4th Cir. 1984). Appellants here, six large commercial banks in North Carolina, fear the competition of the North Carolina Local Government Employees Credit Union (LGCU) and challenge the decision by the National Credit Union Administration (NCUA) approving the formation of the credit union. Specifically, the banks assert that the charter of LGCU was granted in violation of the National Credit Union Act of 1934. The district court, relying on *Leaf Tobacco*, held that appellants lacked standing because their interests fell outside the zone of interests protected or regulated by the statute. We affirm.

We hold to the principle that it is primarily the province of Congress to consider and weigh the interests of those potentially affected by legislation and subsequent administrative action. A statute reflects the considered judgment of Congress that a particular course of action is desirable even though it inevitably advances some interests at the expense of others and affords only certain interests consideration in the administrative process. In deference to this legislative function, the judiciary will intervene only at the instance of those interests arguably within the zone of interests regulated or protected by the law in question. Here, Congress acted to enhance credit availability for people of limited means and collateral, and evidenced no concern to protect or consider the interests of banks at the expense of them. To allow the banks to challenge the administrative action would thwart the legislative mandate and introduce a voice into the process never anticipated or intended by Congress.

I.

This litigation follows a similar dispute over the legitimate scope of a credit union charter under North Carolina law. In September, 1977 the North Carolina Credit Union Administration approved an expansion of the North Carolina State Employees' Credit Union (SECU) membership to include all local government employees who participated in state administered retirement systems and federal employees working in conjunction with them. The North Carolina Bankers Association, Savings and Loan Association, and Savings and Loan League challenged this action as a violation of state law, which limits membership in a state credit union to those possessing a "common bond." N.C.G.S. § 54-109.26. The Supreme Court of North Carolina upheld the challenge, and ordered the removal of local government employees from SECU's field of membership. *In re Appeal of North Carolina Savings and Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981). This action left some 30,000 individuals without credit union services.

Frustrated in their attempts to form a state credit union, ten local government employees sought to establish a federal credit union to serve "[e]mployees and elected and appointed officials of city and county government units in North Carolina." Upon receipt of the charter application, the National Credit Union Administration conducted an exhaustive investigation into the propriety and viability of the proposed credit union. Its report noted that the majority of North Carolina municipalities are so small that they could not support credit unions by themselves and that many are "geographically located where no existing credit union services are available." In light of the need for credit union services and the perceived enthusiasm of local employees, the report recommended approval of the application. E.F. Callahan, Chairman of the NCUA Board, approved the organization certificate on March 24, 1983.

The LGCU began operations on July 1, 1983, using the

services and facilities of the SECU under a fee-for-service contract. The credit union grew rapidly, enlisting more than 6000 members form 245 local governments in North Carolina by March, 1984. The LGCU made its first loan in September, 1983 and within three weeks loaned $1.5 million to 752 members.

Appellants brought this action under the Administrative Procedure Act, 5 U.S.C. § 704, to challenge the decision by NCUA to grant LGCU's organizational certificate. They allege that the decision violated the requirement of 12 U.S.C. § 1759 that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." Appellants seek to protect themselves from competition from LGCU, which, like all federal credit unions, enjoys advantages bestowed by federal law. *See, e.g.*, 12 U.S.C. § 1768 (exempting credit unions from taxation). We need not consider the merits of these claims, however, for we conclude that they fall outside the zone of interests protected by Congress in the National Credit Union Act.*

II.

Appellants here have satisfied the constitutional requirements of standing. In seeking reversal of the NCUA decision approving the formation of LGCU, appellants have asserted harm to their business interests. The advent of a substantial credit union may well compete with banks for depositors, borrowers, and other consumers of financial services. The banks have accordingly shown that they "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This injury, moreover, can be "fairly traced to the challenged action" and "is likely to be redressed by a

*We have also reviewed appellants' challenge under the Fifth Amendment and find it to be meritless.

favorable decision" by the court. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Satisfaction of constitutional standing requirements does not, however, end our inquiry. *See, e.g., Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-54 (1970); *Leaf Tobacco*, 749 F.2d at 1112. Plaintiffs must also satisfy prudential requirements established by courts to advance values imperfectly realized by constitutional limitations alone. Among the foremost prudential requirements is the "zone of interests" principle. First articulated in *Data Processing*, 397 U.S. at 153, it requires that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Though we recently considered in detail the merits of the zone test, *Leaf Tobacco*, 749 F.2d at 1110-13, it is useful to re-emphasize briefly its role in our federal system.

The zone test serves primarily to advance the separation of powers values that constitute a central concern of standing principles in general. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). Legislation and subsequent administrative actions inevitably affect a multitude of groups and individuals in our complex and highly integrated society. This is perhaps especially significant where, as here, legislation alters the structure of the marketplace. A test requiring only injury in fact — the constitutional minimum — would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect. This litigation would necessarily obstruct the operation of programs established by Congress and "come at the expense of the intended beneficiaries." *Leaf Tobacco*, 749 F.2d at 1115. For this reason, "the zone test rests on the need to secure the benefits of a statutory program for the groups that Congress intended to benefit." *Id.* at 1111. *See also, id.*, at 1116 ("The zone of interest test is a construct that permits government officials to act in furtherance of

congressional purposes with the prospect of protracted court challenges from those whose interests Congress clearly did not protect.")

The zone test serves not only to protect against frustration of Congressional *purpose*, but also to ensure proper respect for the legislative *process*. When drafting legislation, Congress is uniquely suited to consider the voices of those potentially injured or benefited by its action. Hearings, lobbying, and letters accompany the consideration of nearly every bill before it. The bill as passed represents a determination by Congress of the best course of action in light of the effect this action will have on a broad range of interests in society. This is the democratic process at work, and it inevitably produces "losers." Litigation, however, should not be seen as an extension of the legislative process. Proper respect for the judgment of Congress instead requires that some degree of finality be accorded its balancing of interests. Otherwise, courts would be asked to review the legislative mandate for no other reason than the fact that Congress is unable to protect or advance some interests without sacrificing others. To guard against such overreaching, the zone test dictates that parties left unprotected or unregulated by legislation must return to the legislative process if they are dissatisfied with its outcome. Absent some evidence that the interests of these parties are a subject of continuing concern in the statutory scheme, we will not allow them to reopen the legislative inquiry in a federal court.

III.

Appellants urge that we ignore these principles and forego the application of the zone test on these facts. They perceive a factual distinction between this case and *Leaf Tobacco* that they believe makes the zone test inapplicable here. Specifically, appellants assert that *Leaf Tobacco* did not involve a mandatory limitation on administrative action such as that found in the common bond provision,

and that accordingly review should proceed without consideration of the zone test.

We see no merit in either the factual or legal distinction advanced by appellants to escape this prudential requirement. Both *Leaf Tobacco* and the instant case arose under the Administrative Procedure Act, and both involved claims that an administrator "depart[ed] from the mandatory criteria" he was "required to consider" under the substantive statute at issue. *Leaf Tobacco*, 749 F.2d at 1110. Nothing in *Leaf Tobacco* or any other zone case rested on the existence of discretionary authority. The zone test instead rests on concerns as to the proper roles of courts and Congress which apply regardless of whether the statutory language at issue is restrictive or permissive. We have noted, moreover, that application of the zone test is not discretionary, *id.* at 1112, and see no reason to depart from that view here. Even critics of the zone test recognize its usefulness and propriety where a statute is enacted to protect or serve the interests of an identifiable segment of society, here, persons with limited resources to secure credit. *See* 4 K. Davis, *Administrative Law Treatise* § 24-17, at 279 (2d ed. 1983).

IV.

Turning to the facts of this dispute, we have no trouble concluding that appellants have failed to meet the requirements of the zone test. The question, of course, is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. Appellants are not "compelled to avoid or to undertake any activity," *Leaf Tobacco*, 749 F.2d at 1113, under the National Credit Union Act or its common bond provision, and accordingly do not claim to be regulated by the statute. We thus focus on whether the banks' interests are arguably within the zone of those protected by the statute. Examination of

both the general purposes of the statute and the specific interests served by the common bond requirement convinces us that the interests of banks are far removed from the interests of the credit union members protected by these provisions.

"The sources pertinent to this examination are the language of the relevant statutory provisions and their legislative history." *Control Data Corp. v. Baldrige*, 655 F.2d 283, 294 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981). We consider first the general statutory context in which the specific provision is found. Congress passed the National Credit Union Act of 1934 in response to the existence of usurious rates of interest and the widespread unavailability of credit for people of limited resources, conditions that hampered economic recovery. The Act was accordingly designed "to make more available to people of small means credit for provident purposes." S. Rep. No. 583 73d Cong., 2d Sess. 1 (1934). *See also*, H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1 (1934). The federal credit union system was therefore established as an alternative to an unacceptable credit structure, a structure that included banks. Thus, the general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means. Absent any specific evidence to the contrary, it would be anomalous to conclude that the banks are somehow protected by this action.

Appellants, however, would have us find in 12 U.S.C. § 1759 a congressionally mandated fetter on the operation of the Act designed to "protect competitors who do not enjoy the favors and advantages inherent in a credit union's operations." We see no evidence, however, other than this bald assertion by appellants, that Congress "abruptly reverse[d] direction and subordinate[d] the [credit unions'] interests to the interests of their competitors." *Leaf Tobacco*, 749 F.2d at 1115. Consistent with the general goals of the statute, the common bond

provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.

The purpose of the common bond provision is evident from the nature of the institutions created by the Act. A credit union has been aptly described as "a democratically controlled, cooperative, nonprofit society organized for the purpose of encouraging thrift and self-reliance among its members . . . [It] is fundamentally distinguishable from other financial institutions in that the customers may exercise effect control." *La Caisse Populaire St. Marie v. United States*, 563 F.2d 505, 509 (1st Cir. 1977). The union's purposes are threatened by directors that are unmindful of members' funds or unresponsive to their collective interests. Thus Congress ensured that federal credit unions would retain their character as self-managed cooperatives by establishing democratic principles of decision and control. *See, e.g.*, 12 U.S.C. § 1760-1764. The common bond provision reinforces this aim by advancing the formation of credit unions among groups that may realistically operate with unity of purpose. It encourages the election to directors who possess a common interest or occupation with the membership they serve. *See Board of Directors and Officers, Forbes Federal Credit Unin v. National Credit Union Administration*, 477 F.2d 777, 783 (10th Cir.), *cert. denied*, 414 U.S. 924 (1973); *National Alliance of Postal and Federal Employees v. Nickerson*, 424 F.Supp. 323, 324-26 (D.D.C. 1976). *See also Appeal of Savings and Loan League*, 276 S.E.2d at 411. There is no evidence from any source cited to this court that Congress also intended by this provision to protect the competitive interests of banks. Given the specific rationale for the common bond requirement, we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position.

Though this holding leaves appellants without recourse in a federal court, it hardly means that they are powerless to pursue their goals elsewhere. Banks are not without significant power and influence in the executive and legislative process. Congress, moreover, has shown in a related context that it knows how to direct attention to the interests of other financial institutions when it so desires. *See, e.g.*, 12 U.S.C. § 1464(e) (allowing formation of savings and loan only where this can be achieved "without undue injury to properly conducted existing local thrift and home financing institutions"). We believe, however, that the decision to allow consideration of such interests at the potential expense of statutory beneficiaries is, in the first place, properly left to the Congress, and we refuse to intervene on behalf of those interests where Congress has not done so.

Accordingly, the decision of the district court is

AFFIRMED.

Appendix B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 85-1522

Branch Bank and Trust Company;
First Union National Bank;
NCNB National Bank of North Carolina;
The Planters National Bank & Trust Co.;
United Carolina Bank and
Wachovia Bank & Trust Co., N.A.,

Appellants,

versus

National Credit Union Administration Board;
E.F. Callahan, Chairman of the National
Credit Union Administration Board;
National Credit Union Administration and the
North Carolina Local Government Employees
Federal Credit Union,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

John M. Greacen

March 18, 1986 Clerk

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 85-1522

Branch Bank and Trust Company, et al,

Appellants,

versus

National Credit Union Administration Board, et, al,

Appellees.

Appeal from the United States District Court for the Eastern District of North Caroilna, at Raleigh, Terrence W. Boyle, District Judge.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Widener and Judge Butzner.

For the Court,

John M. Greacen

April 21, 1986 Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

NO. 84-513-CIV-5

BRANCH BANK & TRUST COMPANY et al.,	)	
Planintiffs,	)	
vs.	)	*MEMORANDUM AND ORDER*
NATIONAL CREDIT UNION ADMINISTRATION BOARD, et al.,	)	*ALLOWING SUMMARY JUDGMENT*
Defendants.	)	

April 24, 1985

This cause came on to be heard before the undersigned United States District Judge on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The court heard oral argument on February 19, 1985, and allowed supplemental briefs to be filed; the court now makes the following memorandum and order.

The plaintiffs are commercial banks in North Carolina. They bring this action for declaratory and injunctive relief against the National Credit Union Administration, and the North Carolina Local Government Employees Federal Credit Union, a federally chartered credit union with branch offices throughout North Carolina. The

plaintiffs claim standing as competitors in the financial market with the defendant credit union. Plaintiffs seek review of the Administration's certification of the credit union on the grounds that the local government employees had no "common bond" as required by 12 U.S.C. § 1759. The plaintiffs also claim relief under the Fifth and Fourteenth Amendments to the Constitution.

Prior to this controversy, the plaintiffs successfully challenged the extension of the coverage of the North Carolina State Employees Credit Union to employees of local governments in North Carolina in the state courts under the North Carolina Credit Union Act. *Savings and Loan League, et al. v. Credit Union Commission, et al.*, 302 N.C. 458, 276 S.E.2d 404 (1981). Subsequently, the local governmental employees were chartered as a federal credit union. The state employees credit union now provides services and accommodations to the North Carolina Local Government Employees Federal Credit Union on a fee-for-service basis.

The court must first determine whether the plaintiffs have standing. This circuit recently addressed the doctrine of standing in *Leaf Tobacco Exporters Association, et al v. Block, Secretary*, 749 F.2d 1106 (4th Cir. 1984). The tobacco exporters claimed standing because the Secretary of Agriculture's decision competition in the tobacco exporting market affected them. They claimed that the decision gave the Tobacco Stablization Corporation (the Cooperative) a preferred position in the export market. The plaintiffs further argued that the Secretary failed to comply with the Administrative Procedures Act and the statutes governing the federal tobacco program when he allowed the Cooperative to enter the export market. Similarly, the plaintiffs in this case object to the entry of this federally chartered credit union into the financial market because it could compete advantageously with the banks.

In *Leaf Tobacco*, the court discussed the constitutional doctrine of standing and the non-constitutional, but no less mandatory, requirement that a plaintiff be within the

zone of interest which the statute was intended to protect in order to challenge the statutory action. The court also recognized that the constitutional doctrine of a separation of powers limited the court's jurisdiction, and concluded that the plaintiffs had no standing to challenge the Secretary's decision.

> To permit the courts to hear the claims is to sanction intervention into legislative provinces that neither invite nor warrant judicial review. In limiting such intervention, the zone test furthers the general recognition of standing doctrine that courts should "exercise self-restraint in the utilization of our power to negative the actions of the other branches." *United States v. Richardson,* 418 U.S. 166, 188 (1973) (Powell, J., concurring).

Id. at 1112.

In this action, just as in *Leaf Tobacco,* the plaintiffs have complained that they will face increased competition from the local employees credit union and will suffer injury-in-fact. The possibility of this financial harm neither satisfies the zone of interest test nor exempts the banks from its requirement. *Id.*

The chartering of the credit union was within the legitimate exercise of executive authority. The plaintiffs are not within the zone of interest to be protected by the statutory reference to a "common bond" so as to allow them to challenge the defendants' action in this court.

The Federal Credit Union Act, 12 U.S.C. 1751, *et seq.,* provides for the establishment and regulation of federal credit unions. Neither the Act, nor the regulations under it, extend standing to a commercial bank to challenge the decision to charter a federal credit union. The plaintiffs may argue that if they do not have standing to sue, suit will not be brought; but this contention does not give them standing. *Id.*

The purpose of the Federal Credit Union Act generally and the specific prupose of the "common bond" provision in 12 U.S.C. 1759 is to benefit, support, and strengthen the

activity of federal credit unions. The common bond is a shield to protect the members of credit unions and not a sword to be seized by potential competitors to challenge the executive actions of the Board in granting a charter.

For these reasons the court finds the plaintiffs to be outside the protected zone of interest contemplated by the Federal Credit Union Act. The plaintiffs therefore have no standing to proceed further on these claims.

The plaintiffs also allege claims under the Fifth and Fourteenth Amendments to the Constitution. The plaintiffs have no claim under the Fourteenth Amendment because they allege claims against agencies of the United States.

The plaintiffs' Fifth Amendment Due Process argument, stripped to its core, is that the plaintiffs' share of the market ought to be spared from competition by new financial institutions. The plaintiffs have no property right to be free from competition. The licensing of additional financial institutions by the appropriate executive agencies does not deprive the plaintiffs of "property" without due process of law.

The Supreme Court has inferred an Equal Protection component in the Fifth Amendment's Due Process Clause, but only for classifications so arbitrary as to be denials of Due Process. *Bolling v. Sharp*, 347 U.S. 497 (1954). The plaintiffs have failed to show such an egregious denial.

In an equal protection analysis this court must apply a rational relationship standard of review. The plaintiffs made no claim of a suspect classification or denial of a fundamental right, and therefore strict scrutiny is inappropriate. The plaintiffs have alleged interference with economic interests and such claims are governed by the rational relationship standard. *See Stanton v. Stanton*, 421 U.S. 7, 13 (1974).

The plaintiff banks and the defendant credit union are not similarly situated. The differing regulations which govern the parties are rationally related to the differences between the parties. The plaintiffs have failed to state a claim under the equal protection component of the Fifth Amendment's Due Process Clause. *See New Motor Vehicle*

Board of California v. Orrin W. Fox Co., 439 U.S. 98, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

For the foregoing reasons, the motion of the plaintiff for summary judgment is DENIED and the motions of the defendants for summary judgment are ALLOWED and the plaintiffs' action is dismissed.

TERRENCE W. BOYLE
United States District Judge